No. 89- 3

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

In Re: SYNERGY GAS CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

JAMES A. STEPHENS, Chairman
WILFORD W. JOHANSEN, Member
MARY MILLER CRACRAFT, Member
DENNIS DEVANEY, Member
JOHN E. HIGGINS, JR., Member

REGION 29, NATIONAL LABOR RELATIONS BOARD,
ALVIN P. BLYER, DIRECTOR, REGION 29

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Must an appellate court issue a writ of mandamus when an administrative agency which is subject to the appellate court's authority alters, amends and otherwise deviates from the letter and spirit of the appellate court's prior ruling and accordingly leaves a party in immediate danger of irreparable harm without the availability of a remedy?

List of Parties

The parties to the proceeding below are Petitioner, Synergy Gas Corporation, and the following Respondents: National Labor Relations Board; James A. Stephens, Chairman; Wilford W. Johansen, Member; Mary Miller Cracraft, Member; Dennis Devaney, Member; John E. Higgins, Jr., Member; Region 29, National Labor Relations Board; Alvin P. Blyer, Director, Region 29.

Rule 28.1 List

The parent company of Synergy Gas Corporation is Synergy Group Incorporated. Synergy Gas Corporation has no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

TITLE	PAGE
Question Presented	I
List of Parties	I
Rule 28.1 List	I
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Facts and Prior Proceedings	4
REASONS FOR GRANTING THE WRIT	10
Point I—A Circuit Court must issue a writ of mandamus when an administrative agency alters the mandate of the Appellate Court	10
Point II—Synergy's Petition for a writ of mandamus must be granted since it finds itself in the extraordinary circumstance of facing irreparable harm and has no other legal means to attain the relief it desires	14
Point III—Petitioner has a clear and indisputable right to the issuance of a writ of mandamus	18
Conclusion	21

APPENDICES

PAGE

Appendix A—Order without opinion of the United States Court of Appeals for the Second Circuit, dated April 12, 1989 (Denying the Petition for a writ of mandamus) 1a

Appendix B—Affirmance of the Regional Director's decision by the National Labor Relations Board, dated January 11, 1989 ..... 2a

Appendix C—Decision of the Regional Director of the National Labor Relations Board which denied an employee's decertification petition, dated September 1, 1988 ..... 3a

Appendix D—The Order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for clarification of the Court's enforcement of the Bargaining Order, dated May 2, 1988 ..... 7a

Appendix E—The Order of the United States Court of Appeals for the Second Circuit, dated March 30, 1988, reported at 843 F.2d 1510 ..... 8a

Appendix F—Motion for Clarification of the Court's enforcement of the Bargaining Order, dated April 21, 1988 ..... 10a

Appendix G—The text of the statutes involved in this proceeding 16a

TABLE OF AUTHORITIES

PAGE

Cases:

Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 12, 16

American Trucking Association v. *Interstate Commerce Commission*, 669 F.2d 957 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) 10, 11

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 16, 18

Beacon Theaters, Inc. v. *Westover*, 359 U.S. 500 (1959) 16

Brooks v. *National Labor Relations Board*, 348 U.S. 96 (1954) 18

City of Cleveland v. *F.P.C.*, 561 F.2d 344 (D.C. Cir. 1977) 11

Dresser Industries, Inc., 264 N.L.R.B. 1088 (1982) 15

Ex Parte Fahey, 332 U.S. 258 (1947) 16

Kerr v. *United States District Court for the Northern District of California*, 426 U.S. 394 (1976) 16

Mallard v. *United States District Court for the Southern District of Iowa*, _____ U.S. _____, 57 U.S.L.W. 4487 (1989) 17

Mar-Jac Poultry Company, Inc., 136 N.L.R.B. 785 (1962) 18

National Labor Relations Board v. *All Brand Printing Corp.*, 594 F.2d 926 (2d Cir. 1979) 18

National Labor Relations Board v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) 18

PAGE

National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 15

National Labor Relations Board v. *Priced-Less Discount Foods, Inc.*, 407 F.2d 1325 (6th Cir. 1969), supplementing 405 F.2d 67 (6th Cir. 1968) 19

Piambino v. *Bailey*, 757 F.2d 1112 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) 11

Roche v. *Evaporated Milk Association*, 319 U.S. 21 (1943) 10, 16

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 16

Silverman v. *National Labor Relations Board*, 543 F.2d 428 (2d Cir. 1976) 12

United States v. *United States District Court for the Southern District of New York*, 334 U.S. 258 (1948) 10

United States ex rel. Bernadin v. *Duell*, 172 U.S. 576 (1899) 18

Will v. *United States*, 389 U.S. 90 (1967) 10, 11, 16, 18

Statutes:

28 U.S.C. Section 1651 (a) 2, 3, 4

29 U.S.C. Section 158 (a) (5) 3, 6, 7

29 U.S.C. Section 159 (c) (1) 3, 8, 19

29 U.S.C. Section 160 (f) 3, 5, 9, 15

Miscellaneous:

C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure (1st ed. 1977) 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Synergy Gas Corporation ("Synergy") respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered in the within proceeding on April 12, 1989, which denied the Petition for a writ of mandamus.

Opinions Below

The Order, without opinion, of the United States Court of Appeals, Second Circuit dated April 12, 1989, which denied the

Petition for a writ of mandamus has not been reported and is reprinted in the appendix hereto. (App. A, *infra*, 1a).

The affirmance of the Regional Director's decision by the National Labor Relations Board ("NLRB" or "Board"), dated January 11, 1989, is not reported and is reprinted in the Appendix hereto. (App. B., *infra*, 2a).

The decision of the Regional Director of the Board, dated September 1, 1988, which denied the decertification petition filed by one of Petitioner's employees, is not reported and is reprinted in the Appendix hereto. (App. C, *infra*, 3a).

The United States Court of Appeals Order, dated May 2, 1988, which denied Petitioner's motion for clarification of the Court's March 30, 1988 enforcement order, was not reported and is reprinted in the Appendix hereto. (App. D, *infra*, 7a).

The United States Court of Appeals, Second Circuit's Order, dated March 30, 1988, enforcing the NLRB's Decision and reported at 283 N.L.R.B. No. 100 (1987), is reported at 843 F.2d 1510 (2d Cir. 1988) and reprinted in the Appendix hereto. (App. E., *infra*, 8a). The Second Circuit enforced the bargaining order for the reasons set forth in its decision in *NLRB* v. *Star Color Plate Service, Division of Einhorn Enterprises, Inc.*, reported at 843 F.2d 1507 (2d Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 81 (1988).

Jurisdiction

The Petitioner invoked federal jurisdiction pursuant to 28 U.S.C. 1651(a) on March 20, 1989, seeking a writ of mandamus to require the Board, its Chairman and Members, Region 29 of the Board, and the Director of Region 29 to process to a secret ballot election an employee decertification petition. Without opinion, the Second Circuit Court of Appeals entered an order on April 12, 1989, which denied the Petition. (App. A, *infra*, 1a).

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254 (1).

Statutes Involved

The statutes involved herein are 28 U.S.C. Section 1651 (a), the "All Writs Act"; Section 8 (a) (5) of the National Labor Relations Act, 29 U.S.C. Section 158 (a) (5); Section 9 (c) (1) of the National Labor Relations Act, 29 U.S.C. Section 159 (c) (1); and Section 10 (f) of the National Labor Relations Act, 29 U.S.C. Section 160 (f), as it provides that the Board's Order dismissing the decertification petition is a final, non-appealable Order. The pertinent texts of these statutes are annexed hereto as App. G, *infra*, 16a.

Statement of the Case

This case presents the urgent question as to when a Circuit Court must issue a writ of mandamus against an administrative agency that has improperly altered and modified the letter and spirit of an earlier decree by the Circuit Court.

The issue arises out of the NLRB's dismissal of a decertification petition filed by one of Petitioner's employees because of an artificially imposed rule that one year of bargaining must elapse before the Board will process a decertification petition to a secret ballot election. The NLRB's conduct followed a Second Circuit judgment directing that employees be informed of their right to petition for a decertification election. This one year waiting requirement was never contemplated by the Second Circuit in its earlier enforcement of the Board's Bargaining Order. Rather, it was implicit from the Circuit Court's earlier Order that any decertification petition would be promptly processed. Thus, the NLRB's action not only violated the Second Circuit's mandate but has also frustrated overwhelming employee sentiment in favor of rejecting the union.[1] Thereafter Petitioner sought, and the

[1] The decertification petition was supported by signatures of 13 out of 16 unit employees.

Second Circuit denied, a writ of mandamus to require the NLRB to proceed to a secret ballot election.

It is well settled that a lower court or an administrative agency is without power to do anything which is contrary to the letter or spirit of the mandate of an appellate court. The appellate tribunal is amply empowered to rectify any deviation from its mandate through the writ of mandamus. In fact, this Court has long held that a usurpation of power by a lower court or administrative agency is an exceptional circumstance which justifies the invocation of the extraordinary remedy of mandamus. Accordingly, the Second Circuit should have granted the Petition for mandamus to compel the NLRB to process the employee's decertification petition.

Moreover, a writ of mandamus must be granted when the party seeking the writ faces imminent irreparable harm and has no other adequate lawful means to attain the relief it desires. Such is the case here, where the Petitioner faces imminent contempt proceedings if it fails to bargain with a bargaining representative unwanted by Petitioner's employees, and there is no other remedy available to it to correct the NLRB's action. The Court of Appeals, by denying the writ of mandamus, deviated so far from the established course of judicial proceedings that this Court should grant certiorari to correct the Circuit Court's error and thereafter grant the writ of mandamus against the NLRB.

Facts and Prior Proceedings

Petitioner is a New York Corporation engaged in the sale and distribution of propane gas and related products, with its principal office and place of business at 175 Price Parkway, Farmingdale, New York. Petitioner has facilities located in Long Island and Brooklyn.

On March 20, 1989, the Petitioner petitioned the Court of Appeals, Second Circuit, for a writ of mandamus, pursuant to 28 U.S.C. Section 1651(a) against the NLRB, its Chairman, Mem-

bers, Region 29 of the NLRB and its Regional Director, to compel them to expeditiously process a Decertification Petition which was filed in the Board's Region 29 on August 11, 1988, by an employee of Petitioner, Geraldine Curran, and to thereafter compel Respondents to proceed to the scheduling and conducting of a decertification election.

The Decertification Petition was dismissed by the Regional Director of Region 29 on September 1, 1988, and this dismissal was affirmed by the NLRB on January 11, 1989. (App. B and C, *infra*, 2a-6a).

The Board's dismissal of the Decertification Petition was inconsistent with the Order and Judgment of the Court of Appeals, Second Circuit of March 30, 1988 (843 F.2d 1510), (App. E, *infra*, 8a), in which the Circuit Court, citing its decision in *NLRB* v. *Star Color Plate Service, Division of Einhorn Enterprises, Inc.*, 843 F.2d 1507 (2d Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 81 (1988), conditioned enforcement of the Board's Order upon the Board giving "actual notice to the current employees of their right to petition for a decertification election."

The Petition for a writ of mandamus was brought because the Petitioner had (and continues to have) no other adequate remedy to seek judicial review of the denial to its employees of the opportunity to have a representation election. The Board's decision dismissing the Decertification Petition is not an appealable final order pursuant to 10 (f) of the National Labor Relations Act ("the Act"). Furthermore, the Petitioner faces immediate contempt proceedings if it does not negotiate with the Union, since the Circuit Court of Appeals has already enforced a Board Order finding that the Union is the bargaining representative for the employees. Aside from the obvious fact that Respondents' actions frustrate employee self-determination rights accorded by the Circuit Court, both the Petitioner and its employees will be irreparably harmed if forced to negotiate and execute a collective bargaining agreement with a Union which may not be the proper

bargaining representative of the employees. In fact, thirteen out of the sixteen employees in the bargaining unit submitted a handwritten petition to the Petitioner seeking rejection of the union.

The history of the related proceedings commenced on July 24, 1981, when Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 282), filed a petition in Board Case No. 29-RC-5495 to represent certain office clerical employees of Synergy. On August 12, 1981, the then Regional Director for Board Region 29 approved a Stipulation for Certification Upon Consent Election in Case No. 29-RC-5495 entered into by Synergy and Local 282 for a unit of all full-time and regular part-time office clerical employees employed by Synergy at its Patchogue, New York location, excluding all temporary employees, guards and supervisors as defined by the Act.

On September 11, 1981, a secret ballot election in Case No. 29-RC-5495 was conducted, resulting in five votes for Local 282, five votes against. Three additional ballots were challenged. On September 16, 1981, Synergy filed objections to the election conducted in Case No. 29-RC-5495. Also on September 16, 1981, Local 282 filed objections to the elections conducted in Case Nos. 29-RC-5493, 29-RC-5494, 29-RC-5495.

On January 22, 1986, over four years after the election in Case No. 29-RC-5495 (and after numerous administrative proceedings at the Board) the then Regional Director determined that a majority of the employees in the unit had selected the Union as their representative for the purpose of collective bargaining. On February 6, 1986, the Acting Regional Director issued a Certification of Representative for a unit of all full-time and regular part-time office clerical employees employed at Synergy's Patchogue location.

On August 19, 1986, Local 282 filed a charge with the Board in Case No. 29-CA-12585 alleging that Synergy violated Sections 8(a)(1) and (5) of the Act. The Union filed an amended charge on

September 26, 1986, alleging that Synergy refused to bargain collectively with Local 282 and refused to furnish Local 282 with the names and addresses of the employees in the bargaining unit. On October 3, 1986, a Complaint and Notice of Hearing was issued. On January 20, 1987, the General Counsel filed a Motion for Summary Judgment and Issuance of Decision and Order with the Board. Synergy filed its opposition to the Motion for Summary Judgment on March 13, 1987.

On April 17, 1987, the Board granted the General Counsel's Motion for Summary Judgment and issued a bargaining order. *Synergy Gas Corp.* 283 N.L.R.B. No. 100 (1987). The Board found that by letters dated April 9, July 28, and August 8, 1986, Local 282 had requested that Synergy bargain, and that since April 9, 1986, Synergy refused to bargain with Local 282 in violation of Sections 8 (a) (1) and (5) of the Act. In addition, the Board found that by letters dated July 1 and August 8, 1986, Local 282 requested the names and addresses of the employees in the bargaining unit, and since July 1, 1986 Synergy failed to provide Local 282 with the employees' names and addresses.

The Board thereafter sought enforcement of its Order before the United States Court of Appeals, Second Circuit. The Petitioner urged, *inter alia*, that it was relieved of any obligation to bargain due to the passage of time and employee turnover prior to certification. By decision dated March 30, 1988 (843 F.2d 1510), (reprinted in Appendix E., *infra*, 8a) the Circuit Court enforced the Board's Order, as more fully set forth below.

The Circuit Court's decision and the Notice to Employees submitted by the Board, approved by the Court and subsequently posted by the Employer, are not traditional.

In its decision, the Court said:

> This petition raises for the second time in less than a month the question of whether a bargaining order issued against an Employer by the National Labor Relations Board should not be enforced because several years have elapsed between the

> certification election and the Board's certification of the union. We enforce for the reasons stated in *NLRB* v. *Star Color Plate Service*, No. 87-4122 (2d Cir. 1988), filed this day. *As in Star Color, the Board shall give actual notice to the current employees of their right to petition for a decertification election, and our enforcement order will thereupon become effective.* (emphasis added.)

Also, the Notice to Employees, pursuant to the Circuit Court's decision, contained the following unusual language:

> Employees, pursuant to Section 9 (c) (1) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

On May 2, 1988 the Circuit Court denied the Petitioner's Motion for Clarification of the Court's Decision (App. D, *infra*, 7a). The Motion, filed on April 21, 1988, sought clarification of the time frame, if any, for employee filing of a decertification petition. (App. E, *infra*, 10a-15a). Thereafter the Petitioner complied fully with the Board's Order by, *inter alia*; posting the Notice to Employees, providing the Union with the names and addresses of bargaining unit employees and bargaining with the Union.

On August 11, 1988, Ms. Geraldine Curran, an employee of the Petitioner at its Patchogue, New York location filed a Decertification Petition with Region 29 of the Board.[2] Without hearings, Regional Director Blyer issued his decision and dismissed

[2] As stated earlier, the Petition was not the result of isolated employee sentiment. Indeed, the Petitioner had a reasonable objective basis to rely upon the filing of the Petition, inasmuch as a copy of a hand signed Petition, stating that an overwhelming majority of the employees (13 of 16 employees) rejected the union, was also submitted to the Petitioner.

the petition on September 1, 1988 (App. C, *infra*, 3a). Thereafter the Employer filed a Request for Review of the Regional Director's decision with the Board, which, without opinion, affirmed the dismissal on January 11, 1989 (App. B, *infra*, 2a). In sum and substance, the Regional Director and the Board dismissed the decertification petition because of untimeliness:

> [N]o question concerning representation may be raised at this time inasmuch as there is an irrebutable presumption of continued majority status for a period of one year following the issuance of a certification of representative by the Board, and the Board will dismiss any representation petition filed before the expiration of such one year period. (App. C, *infra*, 3a-6a).

The Board dismissed the Decertification Petition solely on the basis of untimeliness. According to the Board, as one year of bargaining had not elapsed, the Petition was dismissed as untimely. By its action, the Board improperly modified and frustrated the Circuit Court's directive and employee rights by imposing a time restriction of one year before an election could be held when the Circuit Court contemplated no such restrictions.

Because the Board's decision was not a final appealable order under 10 (f) of the Act, Petitioner filed a Petition for a writ of mandamus on March 20, 1989 in the Second Circuit, as it had no other remedy. In an Order dated April 12, 1989, the Circuit Court, without opinion, denied the Petition. By denying the Petition, the Circuit Court tolerated improper modification and frustration of its own directive by allowing the imposition of a time restriction of one year before an election could be held, when the Circuit Court previously contemplated no such restrictions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

A Circuit Court must issue a writ of mandamus when an administrative agency alters the mandate of the Appellate Court.

The United States Court of Appeals for the Second Circuit erred when it failed to grant the Petition for a writ of mandamus as it did not act to correct the NLRB's alteration of the Circuit Court's earlier decision. This Court must grant the Petition for certiorari in order to correct that error.

As more fully set forth in Point III below at Page 18, the Second Circuit specifically directed that the NLRB 'Notice to Employees' contain language about the right to decertify the union. The Circuit Court thus clearly intended that such right be without a limitation on the timing of such decertification petition. When the NLRB dismissed the decertification petition (App. B & C, *infra* at 2a-6a), it was violating the spirit and intent of the Second Circuit's opinion.

The Supreme Court has long held that exceptional circumstances amounting to a usurpation of judicial power require the invocation of the extraordinary writ of mandamus. *Will* v. *United States*, 389 U.S. 90 (1967), quoting *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943); *United States* v. *United States District Court for the Southern District of New York*, 334 U.S. 258 (1948). Clearly, both lower courts and administrative agencies are bound by the terms of an appellate tribunal's mandate, and must enter an order in strict compliance with that mandate. They must implement both the letter and spirit of the court mandate, for to do otherwise is indeed a judicial or administrative usurpation of power which justifies the issuance of a writ of mandamus. *American Trucking Association* v. *Interstate Commerce Commission*, 669 F.2d 957 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Piam-*

bino v. *Bailey*, 757 F.2d 1112 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

As this Court observed in *Will, supra*:

> "the writ has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 389 U.S. at 95.

In *American Trucking, supra*, the Interstate Commerce Commission had failed to fully comply with the 5th Circuit's mandate to issue binding rules relating to a recently enacted statute. The 5th Circuit held that it had jurisdiction to enforce its prior mandate, and cited with approval a decision from the District of Columbia Circuit, in *City of Cleveland* v. *FPC*, 561 F.2d 344 (D.C. Cir. 1977) which stated:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case," and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. "That approach," we have said, "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." *These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.* Our mission thus becomes definition of the exploratory obligation which our mandate laid upon the Commission, and for guidance we refer to our previous opinion. (emphasis added).

669 F.2d at 960.

The Court of Appeals, in enforcing the Board's bargaining order, specifically stated that the Board shall give actual notice to the *current* employees of their right to petition for a decertifica-

tion election. (emphasis added). The Second Circuit enforced the bargaining order for the reasons set forth in its decision in *NLRB* v. *Star Color Plate Service, Division of Einhorn Enterprises Inc., supra*, in which the Board conditioned enforcement of the bargaining order on the "Board's giving actual notice to the current employees of the statutory right to petition for a decertification election." Implicit in the Court's decision was that any decertification petition would be promptly processed and that current employees would be accorded the right to self determination. Thereafter, following a period of bargaining, when an employee of Synergy filed a decertification petition, the Board wrongfully ignored the letter and spirit of the Court's decision by dismissing the petition because one year of bargaining had not elapsed. Thus, the Board improperly modified the Court's directive by imposing a time requirement where no time requirement was contemplated by the Court.

When the NLRB refused to process the employee decertification petition to an election, the Second Circuit was required to issue a writ of mandamus to vindicate its authority. This Court has written that "it grant[s] chary authorization of mandamus. . . ." *Allied Chemical Corporation* v. *Daiflon, Inc.*, 449 U.S. 34, 35 (1980). For reasons set forth below, this Court's traditional reasons for not granting mandamus (i.e., piecemeal litigation, making a court a litigant, opportunity for further appellate review) are not present here. Rather, the circumstances herein required that the Circuit Court grant the mandamus in order to uphold its authority.

Moreover, the Second Circuit ignored its own teachings when it denied the writ. In *Silverman* v. *National Labor Relations Board*, 543 F.2d 428 (2d Cir. 1976), the NLRB ignored a final judgment of the Circuit Court directing them to determine the amount of back pay owed employees. The Circuit Court, by mandamus, directed that the Board promptly calculate back pay. Similarly, in this matter, the Board has ignored a final judgment of the Circuit

Court directing it to allow Synergy's employees the current right to petition for a decertification election. By imposing a one year waiting requirement, the Board has taken it upon itself to modify and change the Court's ruling.

The Second Circuit's denial of the writ of mandamus was improper as it did not act to correct the agency's alteration of the Court's earlier decision. It is respectfully submitted that this Court must grant a writ of certiorari in order to examine and reverse the Circuit Court's denial of the writ of mandamus. Furthermore, this Honorable Court must intervene because the Circuit Court's action, by denying the writ of mandamus, and permitting the Board's dismissal of the decertification petition to stand, resulted in the improper alteration of the letter and spirit of the Circuit Court's earlier decision.

POINT II

Synergy's Petition for a writ of mandamus must be granted since it finds itself in the extraordinary circumstance of facing irreparable harm and has no other legal means to attain the relief it desires.

In an order dated March 30, 1988, the Second Circuit enforced the Board's bargaining order, specifically stating that the Board shall give actual notice to the employees of their current right to a decertification election. Synergy and the Union then commenced bargaining, meeting and exchanging proposals. Thereafter, when an employee of Synergy, Geraldine Curran, filed a decertification petition, the Board dismissed it (and in the process frustrated employee self determination) because one year of bargaining had not elapsed. The Second Circuit thereafter denied Synergy's Petition for a writ of mandamus which sought to compel the Board to process the decertification petition and to thereafter proceed to a decertification election.

The Board's dismissal of the decertification petition places the Petitioner in imminent peril of irreparable harm without any legal recourse, including that of an appeal. On the one hand, if Synergy refuses to negotiate with Local 282 (which as stated earlier, is unwanted by an overwhelming majority of the members of the bargaining unit), it faces immediate criminal contempt proceedings, and will be forced to defend its position under extremely threatening circumstances. In fact, the Board has already advised Petitioner in writing, in a letter dated May 9, 1989, that it plans to institute immediate criminal contempt proceedings against "your client, Synergy Gas Corporation, [and] also against the officers and agents responsible. . . ." The letter threatens "the imposition of substantial compensatory, coercive, and/or punitive damages against your client [Synergy] and its responsible officers and managing agents."

On the other hand, if Petitioner negotiates with Local 282, both Petitioner and the employees of the bargaining unit could be

confronted with a long term collective bargaining agreement executed with a Union which is not the proper or wanted representative of the employees. As evidenced by the Court of Appeals' conditioning enforcement of the bargaining order on according employees a current right to petition for a decertification election, it is obvious that the court did not intend or mandate such a result. Moreover, such a result is not in accord with the spirit of the NLRA or consonant with Board Law.[3] This Court has noted that the governing precept of the NLRA is protection of employee rights and employee self determination:

> "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." (footnote omitted.)

National Labor Relations Board v. *Gissel Packing Company, Inc.*, 395 U.S. 575, 602 (1969).

Inasmuch as the Petitioner cannot appeal the Board's dismissal of the decertification petition because the Board's action is not a final appealable order under 10(f) of the Act, its only legal recourse is the issuance of this extraordinary writ.

This Court's traditional standards for the issuance of a writ of mandamus provide that the writ will issue in the extraordinary situation where the party seeking the writ has no other adequate remedy to attain the relief desired and that special circumstances, such as the likelihood of irreparable injury or grave injustice,

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[3] Clearly, the Court's previous decision accorded Petitioner's employees rights *not* typically enjoyed in an initial bargaining situation. A review of the Board's seminal ruling in *Dresser Industries*, 264 N.L.R.B. 1088 (1982), establishes that, in a non-initial bargaining situation, an employer's negotiating with a union is unlawful when a decertification petition has been filed *and* the employer has objective proof that a majority of employees repudiate representation. In light of the facts herein, the Board's continued insistence on bargaining and its dismissal of the decertification petition evince a clear departure from its stated approach and the mandate of the Second Circuit. By denying Petitioner's application for a writ of mandamus the Second Circuit has improperly countenanced this action.

would justify the issuance of the writ. *Roche* v. *Evaporated Milk Association, supra; Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980); *see* C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure*, Jurisdiction, Section 3932 at 206 (1st ed. 1977). This Court has always held that the remedy of mandamus should be resorted to where appeal is an inadequate remedy and the circumstances are special. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947). In *Will* v. *United States, supra*, this court reaffirmed the principle that mandamus is appropriate when the party has no recourse of appeal available to it. The Petitioner here has demonstrated the unavailability of the recourse of an appeal or any other legal remedy and has also demonstrated that it faces immediate irreparable harm. The Court of Appeals should have issued the writ of mandamus.

Furthermore, this Court has granted certiorari and has reversed Courts' of Appeals decisions which have denied Petitions for writs of mandamus. *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500 (1959). In *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394 (1976), this Court granted certiorari from the Ninth Circuit's denial of a Petition for a writ of mandamus. This Court restated the rule that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy and analyzed why the writ of mandamus is such an extraordinary remedy. This Court had several concerns. It was concerned about having the unfortunate consequence of making a district court judge a litigant, thereby obliged to obtain personal counsel or leave his defense to one of the litigants appearing before him. Moreover, this Court was concerned and wanted to discourage piecemeal litigation, and also recognized that very often the litigants have other avenues short of mandamus to achieve precisely the relief they seek.

In the pending matter, none of the concerns addressed by this Court regarding the issuance of a writ of mandamus are present. First, the writ that is being sought is directed against the Board and its members, not a District Court judge. Accordingly, none of the concerns about making a judge a litigant are present. Second, there is no issue involving piecemeal litigation here as this action will effectively end all related litigation by allowing employees to choose their collective bargaining representative. Third, the Petitioner has demonstrated that it has no remedy short of the granting of a writ of mandamus, since it has no right to an appeal of the Board decision not to process the decertification petition, and moreover, it will be irreparably harmed by facing immediate contempt proceedings if the writ is not granted.

Accordingly, the Petitioner has demonstrated that all of the elements necessary for the issuance of the writ of mandamus are present. This Court has recently addressed the propriety of granting a writ of mandamus. In *Mallard* v. *United States District Court for the Southern District of Iowa*, ___U.S. ___, 57 U.S.L.W. 4487 (1989), this Court reaffirmed the principle that petitioners for writs of mandamus must show that they lack adequate alternative means to obtain the relief they seek, as well as having a clear and indisputable right to the relief requested. Furthermore, none of the concerns addressed by this Court regarding issuance of the writ exist in this matter. As such, it is respectfully submitted that this Court grant certiorari and thereafter issue a writ of mandamus to compel the Board to process the decertification petition and thereafter proceed to a secret ballot election.

POINT III

Petitioner has a clear and indisputable right to the issuance of a writ of mandamus.

As the second prerequisite for issuance of a writ of mandamus, this Court has required that the party seeking issuance of the writ satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life and Casualty Co.* v. *Holland, supra*, quoting *United States ex rel. Bernardin* v. *Duell*, 172 U.S. 576, 582 (1899); *Will* v. *United States, supra.*

Petitioner submits that under the unique circumstances of this case, it is clearly and indisputably entitled to the relief herein.

It has been the traditional view that when the NLRB issues a certification of representative, an employer is generally duty bound to negotiate with the Union for one year from the date of that certification. *Brooks* v. *NLRB*, 348 U.S. 96 (1954). If the employer were to fail to bargain from the date of the certification the Board would begin the period of one year from the date actual bargaining begins. *Mar-Jac Poultry Company, Inc.*, 136 N.L.R.B. 785, 787 (1962); see also *NLRB* v. *All Brand Printing Corp.* 594 F.2d 926, 929 (2d Cir. 1979).

However, this Court, in approving the NLRB administrative rule, has acknowledged that there are circumstances where the one year presumption becomes a rebuttable one. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, at footnote 4. (1972). Implicitly, this Court, by not creating an irrebutable presumption of one year's worth of bargaining, left it to the sound discretion of the NLRB and the Circuit Courts to determine when the one year rule should not be strictly honored.

In enforcing the Board Order in this case, and its companion case, *NLRB* v. *Star Color Plate Service, Division of Einhorn Enterprises, Inc., supra*, the Second Circuit was faced with a quandary. If it enforced the bargaining order in the traditional manner, it was aware it might be imposing a bargaining representative upon

a completely unwilling employee complement. 843 F.2d at 1510. On the other hand, if the enormous delay in these cases were to be grounds for setting aside the bargaining order, and directing yet another election, other employers might be tempted to engage in such activity. 843 F.2d at 1509. The Court decided to enforce the Board Order, saying that the potential of having an unwanted bargaining representative can be mitigated "by the Board's giving actual notice to the current employees of their statutory right to petition for a decertification election. *Patent Trader*, 426 F.2d at 793." Thus, the Union would be the bargaining representative, subject to ouster by the employees through a decertification election.

After the Second Circuit issued its opinion in this matter, the Board submitted to the Circuit Court a proposed judgment which provided in part for the following language to be included in the Notice to Employees.

The language reads:

> Employees, pursuant to Section 9 (c) (1) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

Thereafter, Synergy filed a Motion for Clarification of the Court's underlying decision in this matter. (App. F, *infra*, 10a-15a). In the Motion, Synergy noted that the language proposed by the Board first appeared in *NLRB* v. *Priced-Less Discount Foods, Inc.*, 407 F.2d 1325 (6th Cir. 1969), supplementing 405 F.2d 67 (6th Cir. 1968).

In that case, the Sixth Circuit enforced a NLRB order, granting as a remedy to the Union the right to bargain for a collective bargaining agreement. In considering the imposition of such an order, the Circuit Court noted there, as in the case at bar, that employees should be informed of their right to petition for a decertification election. When the Board proposed a notice that said in part that "employees may, at an appropriate time, petition the National Labor Relations Board for an election," the Court stated "that the insertion of the above quoted sentence is not a satisfactory compliance with the opinion and mandate of this Court." 407 F.2d at 1325-26. The Court then directed that a paragraph, identical to that submitted by the NLRB in this matter, be included in the Notice to Employees, with no limitation as to when the election could be held.

In comparing that which was proposed to the Sixth Circuit Court and that which was approved, it is crystal clear that the Sixth Circuit Court did not sanction the imposition of any time requirement as to the holding of an election. The Second Circuit, by adopting the Sixth Circuit's language, especially in light of Synergy's Motion for Clarification, clearly adopted the view that the passage of a certain period of time would be not required before the NLRB would process any election petition filed.

Moreover, the Court's directive that *current* employees receive actual notice clearly shows that the Court wished current employees to have such decertification rights. If the Circuit Court contemplated that a year's bargaining would have to elapse before a decertification petition could be processed, then, it is submitted that the Court would have directed that such notice should be given to those employees employed at the time that one year of bargaining had elapsed.

Conclusion

Petitioner has demonstrated that the United States Court of Appeals for the Second Circuit, by departing from officially reported precedent has denied Petitioner relief to which it is indisputably entitled, and relief which cannot be obtained in any other manner, or through any other form. Accordingly, this Honorable Court should grant the Petition for certiorari herein.

Respectfully submitted,

ARTHUR R. KAUFMAN

KAUFMAN, FRANK, NANESS,
SCHNEIDER & ROSENSWEIG, P.C.
425 Broad Hollow Road
Suite 315
Melville, NY 11747
(516) 756-9110

APPENDICES

APPENDIX A

Order without opinion of the United States Court of Appeals for the Second Circuit, dated April 12, 1989

IN RE: SYNERGY GAS CORPORATION,

Petitioner

A petition for writ of mandamus and/or prohibition having been filed, upon consideration thereof, it is ordered that said petition be and it hereby is DENIED

Dated: April 12, 1989

Jon O. Newman

Richard J. Cardamone

Ralph K. Winter

Circuit Judges

APPENDIX B

Affirmance of the Regional Director's decision by the National Labor Relations Board, dated January 11, 1989.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYNERGY GAS CORPORATION
(Case 29-RD-624)

Employer

And

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Union

ORDER

Employer's Request for Review of the Regional Director's administrative dismissal of the instant petition is denied as it raises no substantial issues warranting review.

JAMES M. STEPHENS, *Chairman*

WILFORD W. JOHANSEN, *Member*

MARY MILLER CRACRAFT, *Member*

Dated, Washington, D.C., January 11, 1989.

APPENDIX C

Decision of the Regional Director of the National Labor Relations Board which denied an employee's decertification petition, dated September 1, 1988.

[LETTERHEAD OF NATIONAL LABOR RELATIONS BOARD]

September 1, 1988

Geraldine Curran
1108 Sipp Avenue
Medford, New York 11763

Re: Synergy Gas Corporation
Case No. 29-RD-624

Dear Ms. Curran:

The above-captioned case, petitioning for an investigation and decertification of representatives under Section 9 of the National Labor Relations Act, has been carefully investigated and considered.

On February 6, 1986, the Board issued a Certification of Representative in Case No. 29-RC-5495 on behalf of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, in the following unit:

> All full-time and regular part-time office clerical employees employed by Synergy Gas Corporation a/k/a Glover Bottled Gas Corp., herein called the Employer, at its Patchogue, New York location, excluding all temporary employees, guards and supervisors as defined in the Act.

However, the Employer failed and refused to bargain with the Union following issuance of the Certification, whereupon the Union filed appropriate unfair labor practice charges against the Employer, which eventually resulted in the Board's issuance of a bargaining order against the Employer on April 17, 1987. See *Synergy Gas Corp. a/k/a Glover Bottled Gas Corp.*, 283 NLRB No. 100 (1987). The Board's Order was subsequently enforced by the

United States Court of Appeals for the Second Circuit, which entered a Judgment thereon on April 26, 1988.

Following enforcement of the Board's bargaining order by the Court of Appeals, the Employer and the Union commenced bargaining sometime between July 15, 1988 and August 1, 1988, and the Union is currently seeking to resume such bargaining promptly.

In these circumstances, I have concluded that no question concerning representation may be raised at this time inasmuch as there is an irrebutable presumption of continued majority status for a period of 1-year following the issuance of a certification of representative by the Board, and the Board will dismiss any representation petition filed before the expiration of such 1-year period. See *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954). Moreover, where an employer has failed to meet its statutory duty to bargain in good faith during this 1-year period, the period is extended to commence when such good faith bargaining commences or resumes, and to continue until there has been one full year of bargaining in good faith. Cf. *MAR-JAC Poultry Company, Inc.*, 136 NLRB 785, 787 (1962). In this regard, I note that in the underlying unfair labor practice case herein, the Board specifically stated that "we shall continue the initial period of the certification as beginning the date the Respondent begins to bargain in good faith." Since it appears that the Employer did not acknowledge its obligation to bargain with the Union until the Court of Appeals enforced the Board's Order directing it to bargain and did not commence bargaining with the Union until no earlier than July 15, 1988, it is clear that the 1-year certification period has not expired to date. Accordingly, I am dismissing your petition filed in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing a request therefor with the National Labor Relations Board, addressed to the Executive Secretary, National La-

bor Relations Board, Washington, D.C. 20570. A copy of such request for review must be served on me and each of the other parties to the proceeding. This request for review must contain a complete statement setting forth the facts and reasons upon which it is based. The request for review (eight copies) must be received by the Executive Secretary of the Board in Washington, D.C., by the close of business on September 15, 1988. Upon good cause shown, however, the Board may grant special permission for a longer period within which to file. The request for extension of time should be submitted to the Executive Secretary of the Board in Washington, D.C., and a copy of any such request for extension of time should be submitted to me, and to each of the other parties to this proceeding.

Very truly yours,

Alvin Blyer
Regional Director

Certified Mail
Return Receipt Requested

cc: National Labor Relations Board
1717 Pennsylvania Avenue, NW
Attn: Office of the Executive Secretary
Washington, D.C. 20570

Synergy Gas Corporation
175 Price Parkway
Farmingdale, N.Y. 11735

Local 282, IBT
1925 Linden Blvd.
Elmont, N.Y.

Kaufman, Frank, Schneider & Rosensweig
42 Broad Hollow Road
Melville, N.Y. 11747
Att: Peter Schneider, Esq.

Friedman, Levy-Warren & Moss
1500 Broadway
New York, N.Y. 10036
Att: Frank Moss, Esq.

APPENDIX D

The Order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for clarification of the Court's enforcement of the Bargaining Order, dated May 2, 1988.

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SYNERGY GAS CORP.,
Respondent.

87-4131

NOTICE OF MOTION

For: Clarification of the Court's Decision

MOTION BY:
Peter A. Schneider, Esq.
Kaufman, Frank, Naness, Schneider & Rosensweig, PC
425 Broad Hollow Road, Suite 315
Melville, NY 11747
516-756-9110

OPPOSING COUNSEL:
Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, DC 202-254-9216

Has consent of opposing counsel:
A. been sought? ☒ Yes ☐ No
B. been obtained? ☒ Yes ☐ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
National Labor Relations Board

Brief statement of relief requested:
Clarification as to when a decertification petition should be processed by the Board, if such petition is filed by the employees

Complete Page 2 of This Form
By: *(Signature of attorney)*
Peter A. Schneider
Signed name must be printed beneath
Peter A. Schneider

Appearing for: *(Name of party)*
Synergy Gas Corp.
April 21, 1988
Date

Appellant or Petitioner
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☐ Plaintiff ☒ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be an it hereby is ~~granted~~ denied

Ralph K. Winter
George C. Pratt
Frank X. Altimari
Circuit Judge

May 2, 1988
Date

APPENDIX E

The Order of the United States Court of Appeals for the Second Circuit, dated March 30, 1988, reported at 843 F.2d 1510

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 683—August Term, 1987

(Argued February 1, 1988 Decided March 30, 1988)

Docket No. 87-4131

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SYNERGY GAS CORPORATION a/k/a
GLOVER BOTTLED GAS CORP.,

Respondent.

Before:

WINTER, PRATT and ALTIMARI,

Circuit Judges.

Petition for enforcement of a bargaining order. The employer contends that the bargaining order should not be enforced because more than four years elapsed between the election and the Board's certification decision.

Enforced.

ARTHUR R. KAUFMAN, Melville, New York (Peter A. Schneider, Kaufman, Frank, Schneider & Rosensweig, P.C., Melville, New York, of counsel), *for Respondent.*

WILLIAM M. BERNSTEIN, National Labor Relations Board, Washington, D.C. (Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Peter Winkler, Supervisory Attorney, Robert N. Herman, Law Clerk, of counsel), *for Petitioner.*

PER CURIAM:

This petition raises for the second time in less than a month the question of whether a bargaining order issued against an employer by the National Labor Relations Board should not be enforced because several years have elapsed between the certification election and the Board's certification of the union. We enforce for the reasons stated in *NLRB* v. *Star Color Plate Service*, No. 87-4122 (2d Cir. 1988), filed this day. As in *Star Color*, the Board shall give actual notice to the current employees of their right to petition for a decertification election, and our enforcement order will thereupon become effective.

APPENDIX F

Motion for Clarification of the Court's enforcement of the Bargaining Order, dated April 21, 1988

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SYNERGY GAS CORP.,
Respondent.

87-4131

NOTICE OF MOTION

For: Clarification of the Court's Decision

MOTION BY:
Peter A. Schneider, Esq.
Kaufman, Frank, Naness, Schneider & Rosensweig, PC
425 Broad Hollow Road, Suite 315
Melville, NY 11747
516-756-9110

Has consent of opposing counsel:
- **A. been sought?** ☒ Yes ☐ No
- **B. been obtained?** ☒ Yes ☐ No

Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
- **A. by scheduling order?** ☐ Yes ☐ No
- **B. by firm date of argument notice?** ☐ Yes ☐ No
- **C. If Yes, enter date:** _____

OPPOSING COUNSEL:
Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, DC 202-254-9216

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
National Labor Relations Board

Brief statement of relief requested:
Clarification as to when a decertification petition should be processed by the Board, if such petition is filed by the employees

Complete Page 2 of This Form
By: *(Signature of attorney)*

Appearing for: *(Name of party)*
Synergy Gas Corp.
April 21, 1988

Appellant or Petitioner
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☐ Plaintiff ☒ Defendant

Peter A. Schneider
Signed name must be printed beneath

Date

Peter A. Schneider

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be an it hereby is granted denied

_____
_____

_____ _____
Date *Circuit Judge*

Previous requests for similar relief and disposition:

Statement of the issue(s) presented by this motion:

Whether this Court intended that the Board process to an election an employee decertification petition, without regard to the passage of time.

Brief statement of the facts *(with page references to the moving papers):*

In the companion case of *NLRB* v. *Star Color Plate Service* (87-4122), this Court noted that the imposition of a bargaining representative not wanted by a majority of employees is contrary to the policies of the National Labor Relations Act. To mitigate this result, this Court held that its enforcement order would become effective only after the Board gave actual notice to the current employees. The National Labor Relations Board takes the position that an employee decertification petition will not be processed to an election until after the passage of time. (Aff. p. 3) Thus the Board avers that employees may petition for an election at any time but an election pursuant to such petition would not necessarily follow promptly thereafter.

Summary of the argument *(with page references to the moving papers):*

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 87-4131

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SYNERGY GAS CORPORATION a/k/a
GLOVER BOTTLED GAS CORP.,

Respondent.

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION FOR CLARIFICATION OF THIS COURT'S DECISION

STATE OF NEW YORK)
) s.s.
COUNTY OF SUFFOLK)

Peter A. Schneider, being duly sworn, deposes and says:

1. I am an attorney associated with the law firm of Kaufman, Frank, Naness, Schneider & Rosensweig, P.C., counsel to the Respondent. I am admitted to the Bar of the State of New York and the Bar of the Court of Appeals for the Second Circuit.

2. On March 30, 1988, this Court issued its opinion in the above case. Citing its decision in *NLRB* v. *Star Color Plate Service* (No. 87-4122), this Court conditioned enforcement of the National Labor Relations Board's (hereinafter the "Board") order upon the Board giving "actual notice to the current employees of their right to petition for a decertification election."

3. In *Star Color Plate*, this Court noted that imposing a bargaining representative not wanted by a majority of employees is contrary to the policies of the Act, stating:

> This result can be mitigated by the Board's giving actual notice to the current employees of their statutory right to petition for decertification election. *Patent Trader*, 426 F.2d at 793.

There having elapsed more than one year from the prior election, indeed, more than one year has elapsed from the Board certification, the National Labor Relations Act (hereinafter the "Act") imposes no time limitation to the holding of a decertification election.

4. On April 15, 1988, I received a copy of the Board's proposed Judgment, which proposed that the following paragraph be included as part of the Notice to Employees:

> Employees, pursuant to Section 9 (c) (1) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

The Board's proposed language purports to provide actual notice to the employees of their right to petition the Board for a decertification election. Facially, it also implies that if employees exercise the right to petition the Board, that the Board would immediately process the petition to an election. However, during the course of a telephone conversation I had with the Deputy Associate General Counsel of the National Labor Relations Board, Ms. Aileen A. Armstrong, on April 18, 1988, Ms. Armstrong asserted, in response to my inquiry, that a petition for a decertifica-

tion election filed by Respondent's employees would not be processed by the Board immediately. Rather, she stated that such a petition would not be processed until after a reasonable period for bargaining had elapsed. I then asked if a reasonable period meant one year. Ms. Armstrong responded "not necessarily".

Thus, the Board's interpretation of this Court's language in *Star Color Plate*, and of the proposed notification, seeks to limit the rights Respondent's employees enjoy under Section 9 (c) of the Act.

5. In a similar case, before the Sixth Circuit, the Court granted a Board bargaining order, subject to the Board's notifying the employees of their rights under the Act, "including but not limited to their right of petition for a decertification election." *NLRB* v. *Priced-Less Discount Foods, Inc.*, 405 F.2d 67 (6th Cir. 1968). The Board submitted the following sentence in the notice to the employees:

> However, the employees may, *at an appropriate time*, petition the National Labor Relations Board for an election, pursuant to Section 9 (c) (1) of the National Labor Relations Act, providing that all applicable rules, regulations and standards for conducting such an election are met.

NLRB v. *Priced-Less Discount Foods, Inc.*, 407 F.2d 1325 (6th Cir. 1969) (emphasis added). The Sixth Circuit, however, found that insertion of this sentence was not in compliance with the mandate of the Court, and revised the notice to include, word for word, the same paragraph the Board in this action proposed in its Appendix to the Judgment.

6. It is apparent that the Sixth Circuit, in striking down the words "at an appropriate time", interpreted this paragraph to mean that the employees could petition the Board *at any time* for a decertification election, and that such petition would be processed promptly. The Board is now seeking to reinsert the words

"at an appropriate time" through its interpretation of its notice to the employees, a goal it failed to achieve before the Sixth Circuit.

7. Based on the above, this motion is submitted for the purpose of clarifying the Court's decision in *Star Color Plate*, specifically, as to whether this Court intended that the Board process to an election, an employee decertification petition, without regard to the passage of time.

8. Moreover, Synergy's proposed notice to employees differs from the Board's proposed notice by the insertion of the following sentence "Nothing herein shall preclude the Employer from informing its employees of their rights under this paragraph." The insertion of this language serves two meaningful purposes. First, it furthers the Court's stated intent to provide employees with "actual notice" of their rights beyond a mere posting of notice which some employees may not read. Second, as unique rights are being conferred by the Court's opinion, on current employees, routine language ordinarily not of immediate concern to current employees does not suffice. Because of the extraordinary remedy, extraordinary efforts at communication should be sanctioned.

9. I have read the foregoing Affidavit and know the contents thereof, and it is true to the best of my knowledge.

_____

Peter A. Schneider

Sworn to before me this
____ day of April 1988.

_____

STUART MELNICK
Notary Public, State of New York
No. 4880433—Kings County
Commission Expires December 22, 1988

APPENDIX G

The text of the statutes involved in this proceeding

Statutes Involved

28. U.S.C. Section 1651(a)—The "All Writs Act":
Writs

a. The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

29 U.S.C. Section 158 (a) (5)—Section 8 (a) (5) of the National Labor Relations Act:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159 (a) of this title.

29 U.S.C. Section 159 (c) (1)—Section 9 (c) (1) of the National Labor Relations Act:

1. Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) By an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. Section 160 (f)—Section 10 (f) of the National Labor Relations Act:

(F) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Supreme Court, U.S.
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No. 89-3 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SYNERGY GAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a petition for a writ of mandamus alleging that the National Labor Relations Board had failed to comply with that court's previous mandate.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Brooks v. *NLRB*, 348 U.S. 96 (1954) 4, 5
Burnett Construction Co., 149 N.L.R.B. 1419 (1964) . 2
Commerce Co. d/b/a Lamar Hotel, 140 N.L.R.B. 226 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964) 2
Mallard v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814 (1989) . 5, 6
Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962) . . . 2, 4
NLRB v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 109 S. Ct. 81 (1988) . . . 3

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OPINIONS BELOW

The court of appeals' order denying a petition for a writ of mandamus (Pet. App. la) is unpublished, but the decision is noted at 875 F.2d 856 (Table). The National Labor Relations Board's order denying petitioner's request for review (Pet. App. 2a), and the Regional Director's dismissal of the employee decertification petition (Pet. App. 3a-5a) are unreported. The court of appeals' decision enforcing the Board's order in the underlying unfair labor practice proceeding (Pet. App. 8a-9a) is reported at 843 F.2d 1510. The Board's decision and order in that proceeding are reported at 283 N.L.R.B. 656.

JURISDICTION

The order of the court of appeals was entered on April 12, 1989. The petition for a writ of certiorari was filed on July 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In February 1986, the National Labor Relations Board certified Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) as the collective bargaining representative of petitioner's clerical employees at its Patchogue, New York location. Beginning in April 1986, the Union requested that petitioner bargain with it and furnish the names and addresses of employees in the bargaining unit. Petitioner refused to do so, and the Union filed a complaint with the Board. See 283 N.L.R.B. 656 (1987).

The Board rejected petitioner's defenses and ordered it to bargain with the Union and furnish the requested information. 283 N.L.R.B. at 657-658. The Board added that "[t]o ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date [petitioner] begins to bargain in good faith with the Union." *Id.* at 658 (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962); *Commerce Co. d/b/a Lamar Hotel*, 140 N.L.R.B. 226, 229 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 N.L.R.B. 1419, 1421 (1964), enforced, 350 F.2d 57 (10th Cir. 1965)).

Petitioner continued its refusal to bargain, and the Board requested the court of appeals to enforce the Board's order. Petitioner objected, arguing that the court should deny relief because more than four years had elapsed between the election and the Board's certification decision. The court of appeals rejected that argument and enforced

the Board's order (Pet. App. 8a-9a). It relied on its decision, issued the same day, in *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 109 S. Ct. 81 (1988), adding that "[a]s in *Star Color*, the Board shall give actual notice to the current employees of their right to petition for a decertification election, and our enforcement order will thereupon become effective" (Pet. App. 9a). See *Star Color*, 843 F.2d at 1509-1510.

The Board submitted a proposed judgment that included a Notice to Employees to be posted by petitioner, containing the following language:

> Employees, pursuant to Section 9(c)(l) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

See Pet. App. 13a.

Petitioner moved the court of appeals for "[c]larification as to when a decertification petition should be processed by the Board, if such petition is filed by the employees" (Pet. App. l0a), stating in a supporting affidavit that it was the Board's position that any decertification petition "filed by [petitioner's] employees would not be processed * * * until after a reasonable period for bargaining had elapsed" (*id.* at 13a-14a). In addition, petitioner submitted to the court a proposed judgment requiring that the Board "promptly process" an employee decertification petition. Letter to Clerk, United States Court of Appeals for the Second Circuit, from Peter A. Schneider (Apr. 21, 1988). The court denied petitioner's motion for clarification

(Pet. App. 7a), rejected its proposed judgment, and entered a judgment in the form proposed by the Board. See No. 87-4131 Judgment (2d Cir. Apr. 26, 1988). *

Petitioner began bargaining with the Union sometime between July 15 and August 1, 1988, but then broke off negotiations when an employee filed a decertification petition. Pet. App. 4a. The Board's Regional Director dismissed the petition on September 1, 1988, stating that no question concerning representation could be raised at that time. *Id.* at 3a-4a. The Regional Director noted that there is an irrebuttable presumption of continued majority status for a period of one year following a Board certification. *Id.* at 4a (citing *Brooks* v. *NLRB*, 348 U.S. 96 (1954)). He also explained that where an employer fails to bargain in good faith during the one-year period, the certification year is extended to commence when such good faith bargaining begins or resumes. Pet. App. 4a (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 787 (1962)).

The Regional Director further explained that in issuing a bargaining order in this case, the Board had "specifically stated that 'we shall construe the initial period of the certification as beginning the date the [petitioner] begins to bargain in good faith.'" Pet. App. 4a (quoting 283 N.L.R.B. at 658). He recognized that petitioner had begun good faith bargaining no earlier than July 15, 1988, and that, accordingly, the certification period had not expired. Pet. App. 4a. On January 11, 1989, the Board dismissed petitioner's request for review of the Regional Director's decision on the ground that the request raised no substantial issues warranting review. *Id.* at 2a.

Petitioner then sought a writ of mandamus from the court of appeals to compel the Board to process the

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* A copy of the April 21, 1988, letter from Peter A. Schneider and of the court's judgment of April 26, 1988, have been lodged with the Clerk of this Court.

decertification petition and to conduct an immediate decertification election. The court of appeals denied, without opinion, the petition for a writ of mandamus (Pet. App. la). On July 6, 1989, Justice Marshall denied petitioner's application for recall of the court of appeals' mandate (No. A-1062).

ARGUMENT

Petitioner contends that the National Labor Relations Board failed to obey the court of appeals' mandate (Pet. 10-13), that petitioner faces consequent irreparable injury (*id.* at 14-17), and that it therefore "has a clear and indisputable right to the issuance of a writ of mandamus" (*id.* at 18-20). The court of appeals, which is best situated to determine the requirements of its mandate, properly rejected those contentions in a per curiam order denying the petition for writ of mandamus. No further review of that decision is warranted.

This Court has repeatedly recognized that to be entitled to a writ of mandamus, a party must "demonstrate a 'clear abuse of discretion,' *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 * * * (1953), or conduct amounting to 'usurpation of [the judicial] power,' *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 * * * (1945)." *Mallard* v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814, 1822 (1989). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek * * * and carry 'the burden of showing that [their] right to the issuance of the writ is "clear and indisputable."'" 109 S. Ct. at 1822 (brackets in original). Petitioner has failed to meet "this demanding standard" (*ibid.*).

The National Labor Relations Board has long held that a certified employee representative is presumed to enjoy continued majority status for a period of one year following certification. See *Brooks* v. *NLRB*, 348 U.S. 96, 98 (1954).

Petitioner contends that the court of appeals' decision requiring petitioner to bargain nevertheless obligated the Board to process a decertification petition from its employees without regard to that longstanding rule. Petitioner seems to concede that the court's decision does not expressly direct the Board to depart from its normal practices; nonetheless, petitioner argues that this direction is "[i]mplicit" in the court's decision (Pet. 12).

Petitioner's interpretation of the court of appeals' mandate is incorrect. In entering its judgment, the court of appeals specifically denied petitioner's motion requesting "clarification" that the Board must process an employee certification petition "without regard to the passage of time" (Pet. App. 7a, 10a-11a). The court also refused to enter petitioner's proposed judgment, which would have required that the Board "promptly process" a petition for decertification. See pp. 3-4, *supra*. Instead, the court approved the Board's proposed judgment, which included a Notice to Employees stating that the "rules, regulations and standards" applicable to decertification elections "must be met" (Pet. App. 13a). Thus, the court of appeals evidently intended that the Board's standard rules, including the one-year presumption of majority status, would apply.

We submit that the court of appeals' intention in this case is clear. But in any event, the court of appeals is best qualified to resolve that controversy. This Court may safely presume that the court of appeals properly understood its own mandate in denying the petitioner's request for a writ of mandamus. Since petitioner has failed to demonstrate that its right to mandamus is clear and indisputable (*Mallard*, 109 S. Ct. at 1822), there is no warrant for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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